

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA**

Antonio Middleton, # 340155,) C/A No. 5:14-1111-TLW-KDW
)
Petitioner,)
)
vs.) REPORT AND RECOMMENDATION
)
Warden, Tyger River Correctional Institution,)
)
Respondent.)
)

A Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 was submitted to the court by a state prison inmate appearing pro se. Pursuant to 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in such pro se cases and to submit findings and recommendations to the district court. *See* 28 U.S.C. §§ 1915(e); 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal).

I. Procedural and Factual Background

Antonio Middleton (“Petitioner”) submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, seeking to challenge his convictions for two counts of criminal sexual conduct with a minor under eleven years old. Pet. 1, ECF No. 1. The convictions were entered on a guilty plea in Beaufort County on April 1, 2010, and Petitioner was sentenced to 12 years in prison. *Id.* Although Petitioner lists one ground for relief based on allegations of ineffective assistance of trial counsel, ECF No. 1-2 at 5, the crux of his Petition is that his post-conviction relief application (“PCR”) has remained pending, un-answered by the State of South Carolina since July 2012. Pet. 3, 14, ECF No. 1. He asks this court to order that a hearing be held in his pending PCR action. *Id.* at 14.

Following initial review of the Petition and Petitioner’s submission of documents required to bring the case into proper form, the undersigned requested that the State of South

Carolina, through the Attorney General's Office, provide this court with a status report on the pending Beaufort County PCR case. Order, ECF No. 22. The Attorney General's Office responded on May 30, 2014, and informed the court that the State filed a Partial Return and Motion to Dismiss in the PCR case and that counsel had been appointed to represent Petitioner in that Beaufort County matter. Status Report, ECF No. 26; *see also* Partial Return and Motion to Dismiss in PCR matter, ECF No. 26-1. Review of the available online records of the Beaufort County Court of Common Pleas shows that PCR counsel was appointed for Petitioner on June 3, 2014.¹ Thus, it appears that the Beaufort County PCR case is now active; therefore, Petitioner is still in the process of exhausting his state court remedies regarding his 2010 Beaufort County convictions and sentence.

II. Standard of Review

Under established local procedure in this judicial district, a careful review was made of the pro se Petition filed in this case. The review was conducted pursuant to the procedural provisions of 28 U.S.C. §§ 1915, 1915A, and the Anti-Terrorism and Effective Death Penalty Act of 1996, and in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979).

This court is required to construe pro se petitions liberally. Such pro se petitions are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leake*, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a petition

¹<http://publicindex.sccourts.org/Beaufort/PublicIndex/CaseDetails.aspx?County=07&CourtAgency=07002&Casenum=2012CP0702614&CaseType=V> (last consulted June 27, 2014).

filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89 (2007). When a federal court is evaluating a pro se petition the petitioner's allegations are assumed to be true. *De'Lonta v. Angelone*, 330 F. 3d 630, 630 n.1 (4th Cir. 2003). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

Furthermore, this court is charged with screening Petitioner's lawsuit to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts; *see* Rule 1(b) of Rules Governing Section 2254 Cases in the United States District Courts (a district court may apply these rules to a habeas corpus petition not filed pursuant to § 2254). Following the required initial review, it is recommended that the Petition submitted in this case should be summarily dismissed.

III. Analysis

The Petition for a Writ of Habeas Corpus filed in this case should be dismissed because Petitioner has not fully exhausted his state remedies. With respect to his 2010 Beaufort County convictions and sentence, Petitioner's sole federal remedies are a writ of habeas corpus under 28 U.S.C. § 2254 and possibly, but less commonly, a writ habeas corpus under 28 U.S.C. § 2241, either of which can be sought only after Petitioner has exhausted his state court remedies. *See* 28 U.S.C. § 2254(b); *Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484, 490-91 (1973) (exhaustion also required under 28 U.S.C. § 2241); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). Exhaustion "preserves the respective roles of state and federal governments and avoids unnecessary

collisions between sovereign powers. States are allowed to vindicate their interest in prompt and orderly administration of justice, while the federal judiciary upholds its responsibility to prevent the exercise of illegitimate authority.” *Fain v. Duff*, 488 F.2d 218, 224 (5th Cir. 1973) (citing *Braden*).

Section 2254’s exhaustion requirement provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b), (c). This doctrine requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to the state’s highest court for consideration. *See Picard v. Connor*, 404 U.S. at 276. Before a federal court may consider a habeas claim under § 2254, the petitioner must give the state court system ““one full opportunity to resolve any constitutional issues by invoking one complete round of the

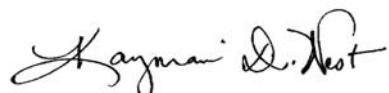
State's appellate review process'" *Longworth v. Ozmint*, 377 F.3d 437, 447-48 (4th Cir. 2004) (quoting from *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

However, as noted above, the pleadings and the Status Report reveal that Petitioner did not file a direct appeal and that his PCR application directed to his 2010 convictions is currently pending and now active in the Beaufort County courts. Because it is clear from the face of the pleadings in this case that Petitioner has several viable state court remedies (possible belated direct appeal, PCR, appellate review of PCR) that have not been fully utilized, this court should not keep this case on its docket while Petitioner is exhausting his state remedies. See *Slayton v. Smith*, 404 U.S. 53, 54 (1971) (federal habeas court should not retain the case on its docket pending exhaustion of state court remedies, but, absent special circumstances, should dismiss the petition); *Salama v. Virginia*, 605 F.2d 1329, 1330 (4th Cir. 1979) (same).

IV. Recommendation

Accordingly, it is recommended that the Petition for a Writ of Habeas Corpus in this case be dismissed *without prejudice*.

IT IS SO RECOMMENDED.



June 27, 2014
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

**The parties are directed to note the important information in the attached
"Notice of Right to File Objections to Report and Recommendation."**